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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>LAMARR D. DEAN et al.,<br><br>Defendants and Appellants. | B258927<br><br>(Los Angeles County Super. Ct. No. KA015038) |

APPEALS from judgments of the Superior Court of Los Angeles County, Juan Carlos Dominguez, Judge. Affirmed in part as modified, reversed in part, and remanded with directions.

Patricia S. Lai, under appointment by the Court of Appeal, for Defendant and Appellant Lamarr D. Dean.

Carlos Ramirez, under appointment by the Court of Appeal, for Defendant and Appellant Kimaris Taylor.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant

Attorney General, Victoria B. Wilson and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

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Lamarr Dean and Kimaris Taylor (collectively, defendants) appeal from judgments entered after a jury found each of them guilty of residential burglary and petty theft. The jury also found Dean guilty of evading a police officer in willful disregard for safety. The jury further found gang enhancement allegations to be true as to the burglary (Dean and Taylor) and evading counts (Dean). After finding prior conviction allegations to be true, the trial court sentenced Dean to 18 years in prison. The court sentenced Taylor to seven years in prison.

Defendants contend the trial court erred in denying their *Batson/Wheeler* motion.[1] They also challenge the true findings on the gang enhancement allegations based on insufficiency of the evidence. We reject these arguments.

As explained below, the trial court made sentencing errors that require correction of the judgments against both defendants and remand for resentencing as to Dean.

**BACKGROUND**

According to Detective Marc King's trial testimony, in or around 2009, the Los Angeles County Sheriff's Department Major Crimes Bureau created the Burglary-Robbery Task Force (the task force) "[d]ue to the numerous residential burglaries committed in the San Gabriel Valley." The task force "target[ed] serious burglars and robbers and the gang members that commit[ted] these crimes." Approximately 12 undercover

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[1] *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

detectives, two marked patrol units, and a surveillance aircraft were assigned to the task force in March 2014, when defendants committed the crimes at issue in this case.

The task force usually surveilled gang members from South Los Angeles, who traveled to the San Gabriel Valley in two-to-five-person "crews" in the morning or early afternoon to burglarize unoccupied residential homes, searching for gold jewelry, firearms and cash. When they committed the burglaries, the suspects typically drove "high end" vehicles that had tinted windows and were registered to other persons (not the suspects) at addresses outside the residential area being burglarized. As Detective King observed when he conducted surveillance for the task force, the suspects would drive these vehicles around, "casing" the neighborhood, stopping in front of various houses until they found the one they wanted to burglarize.

Detective King, the "team leader" of the task force, was the investigating officer on this case. On March 12, 2014, King and his task force team (six undercover units and a surveillance aircraft) were conducting surveillance in Covina after learning that "several residential burglaries" had occurred in the area. At approximately 11:30 a.m., King, who was alone in his unmarked unit, observed a Porsche Cayenne sport utility vehicle with tinted windows moving slowly through the neighborhood. One of his team members ran the license plate, which revealed the vehicle was registered to an address in Hawthorne, about 30 miles away from Covina.

Detective King and his task force team members followed the Porsche for 30 to 45 minutes as it moved through the neighborhood. King testified that the Porsche "would stop in front of a house. Nobody would get out. Pull into driveways.

Stop. Back out again. Drive real slow and ultimately end up [parked] in front of" the home where the burglary charged in this case occurred.

The suspects, who were later identified as Dean and Taylor, exited the Porsche and walked to the front door of the house. Then they walked to the backyard and entered the house through a sliding glass door. About 15 to 20 minutes after Dean and Taylor made entry into the home, Detective King observed them exit the front door of the house. Dean entered the driver side of the Porsche, and Taylor the passenger side. Dean drove away. Detective King entered the house, observed that it had been "ransacked," and instructed a marked patrol unit to stop the Porsche.

A deputy pursuing the Porsche in a marked unit activated the patrol car's lights and sirens after the Porsche crossed a double yellow line on a surface street and drove into oncoming traffic. Dean did not stop the vehicle. Instead, he drove the Porsche onto a freeway and reached speeds of 90 to 100 miles per hour before exiting five miles later in San Dimas. He continued to drive on surface streets until he crashed the Porsche into a curb, damaging a wheel and rendering the vehicle inoperable. Defendants exited the Porsche, each running in a different direction, before deputies apprehended them and took them into custody.

Deputies searched inside the Porsche and found two pairs of gloves and a flashlight with the name "Joel" engraved on it. One of the residents of the house defendants burglarized was named Joel Ruiz. At trial, Joel's wife, Margarita Ruiz, identified the flashlight as the one missing from a bedroom dresser drawer after the burglary. According to Mrs. Ruiz, the burglars also took

seven gold bracelets from her daughter's bedroom, $20 in cash that was on top of a television in her bedroom, and her grandson's iPod.

The jury found defendants guilty of first degree residential burglary (Pen. Code, § 459)[2] and petty theft (§ 484, subd. (a)). The jury found Dean guilty of evading a police officer in willful disregard for safety. (Veh. Code, § 2800.2, subd. (a).) The jury also found that defendants committed the burglary, and Dean committed the evading offense, for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members, within the meaning of section 186.22, subdivision (b)(1)(B). We will set forth below the evidence supporting the gang enhancements (i.e., the gang expert's testimony), in reviewing defendants' challenges to the sufficiency of the evidence supporting the enhancements.

Dean waived his right to a jury trial on prior conviction allegations set forth in the information. The trial court found true the allegations that Dean had sustained a prior strike conviction within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), a prior serious felony conviction within the meaning of section 667, subdivision (a)(1), and had served two prior prison terms within the meaning of section 667.5, subdivision (b).

The trial court sentenced Dean to 18 years in prison: the middle term of four years for the burglary, doubled to eight years under the Three Strikes law, plus a consecutive five-year term for

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[2] Statutory references are to the Penal Code unless otherwise indicated.

the gang enhancement, and a consecutive five-year term for the prior serious felony enhancement (§ 667, subd. (a)(1)). The court imposed and stayed a one-year term for each of the two prior prison terms (§ 667.5, subd. (b)). For the offense of evading a police officer, the court sentenced Dean to a concurrent term of nine years: the middle term of two years for the offense, doubled to four years under the Three Strikes law, plus a consecutive five-year term for the gang enhancement. For the petty theft, the court sentenced Dean to a concurrent term of six months in county jail.

The trial court sentenced Taylor to seven years in prison: the low term of two years for the burglary, plus a consecutive five-year term for the gang enhancement. For the petty theft, the court sentenced Taylor to a concurrent term of six months in county jail.

## DISCUSSION

### *Batson*/*Wheeler* Motion

Defendants, African-American men, contend the trial court erred in denying a *Batson*/*Wheeler* motion they made after the prosecutor exercised her first peremptory challenge to excuse an African-American woman (Juror No. 10), the only African-American person on the panel of 50 potential jurors.

#### Applicable law

"Both the federal and state Constitutions prohibit any advocate's use of peremptory challenges to exclude prospective jurors based on race. (*Batson*, *supra*, 476 U.S. at p. 97; *Georgia v. McCollum* (1992) 505 U.S. 42, 59; *Wheeler*, *supra*, 22 Cal.3d at pp. 276-277.) Doing so violates both the equal protection clause of the United States Constitution and the right to trial by a jury drawn from a representative cross-section of the community

under article 1, section 16 of the California Constitution." (*People v. Lenix* (2008) 44 Cal.4th 602, 612.) "The *Batson* three-step inquiry is well established. First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. [Citation.] The three-step procedure also applies to state constitutional claims." (*Id*. at pp. 612-613.)

Defendants argue the trial court erred at the third stage of the three-step inquiry, in finding the prosecutor excused Juror No. 10 for race-neutral reasons and defendants did not prove purposeful discrimination. At this third stage of the *Batson*/*Wheeler* inquiry, "'the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible.'" (*People v. Lenix*, *supra*, 44 Cal.4th at p. 613.) "Review of a trial court's denial of a *Wheeler*/*Batson* motion is deferential, examining only whether substantial evidence supports its conclusions. [Citation.] 'We review a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges "'with great restraint.'" [Citation.] We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory

justifications offered, its conclusions are entitled to deference on appeal. [Citation.]'" (*Id*. at pp. 613-614.)

**Proceedings below**

In providing the required biographical information during voir dire, Juror No. 10 stated she lived in Pomona, worked at a text servicing agency, had never been married, had no children, had never served on a jury, and had not answered "yes" to any of the inquiries on the questionnaire the potential jurors completed.

During the prosecutor's questioning of the potential jurors, the prosecutor addressed Juror No. 10, stating, "We haven't heard anything from you much." The prosecutor asked Juror No. 10 if she watched any "legal shows" on television, and Juror No. 10 responded affirmatively, listing the names of the shows she had watched. The prosecutor then asked Juror No. 10 if she "kn[e]w the difference between circumstantial evidence and direct evidence based on what [she] watch[ed]." Juror No. 10 provided a definition of circumstantial evidence, and the prosecutor responded: "Perfect. Exactly what it is."

Then the prosecutor posed the following hypothetical about another juror's (Juror No. 11) dog named Sam: "Let's say Sam is kept in a backyard during certain times of the day. And let's say that you leave the house and you leave Sam out in the backyard. Okay? And you go run an errand for about 20 minutes. And you come home and you see that on the side of the house near the fence that lead[s] to the street, there are doggie paws by the dirt. And you see a hole has been dug by presumably the dog because the dirt is kind of -- the pile of dirt is on the house side of the fence, not leading out. And there's no Sam. You go looking for Sam. And you find Sam down the street hanging out with juror number 12's dog. [¶] . . . [¶] And you see that Sam has dirty

paws, a dirty little nose there, and let me ask you, juror number 11, what's the reasonable conclusion that you can make from that?" Juror No. 11 expressed a desire for direct evidence, and an initial hesitation to find the dog guilty of digging out of the yard based only on circumstantial evidence, but ultimately agreed that circumstantial evidence could support a guilty verdict.

The prosecutor asked Juror No. 10 for her "take on [the] circumstantial evidence" posited in the hypothetical. Juror No. 10 responded: "It would be strong circumstantial evidence for me. I would like the direct, you know, evidence. I would like more of direct evidence." The prosecutor asked Juror No. 10 for her "ultimate verdict," and Juror No. 10 responded that she "would probably say not guilty" because "there was no proof that the dog actually did it." The prosecutor inquired about what evidence Juror No. 10 would require to find the dog guilty. Juror No. 10 stated: "Probably dirt samples,[3] and it's kind of hard. You would think that the dog's normal behavior is to dig himself out of the yard when the owner is gone. You know, it might have been he might have just got out. And he didn't actually dig the hole or anything like that." The prosecutor then asked: "What if there is no evidence of any other evidence [*sic*] in the yard?" Juror No. 10 responded: "That would be more guilty." But she continued to express a preference for additional evidence, stating: "Maybe something on him other than dirt because dogs get dirty all the time."

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[3] Another potential juror had previously inquired whether "soil samples" would be direct evidence in the hypothetical dog case.

Juror No. 8 also expressed concern about finding the dog guilty based on the circumstantial evidence set forth in the prosecutor's hypothetical.

Shortly after the discussion about the hypothetical, the prosecutor used her first peremptory challenge to remove Juror No. 10. Defendants made a *Batson*/*Wheeler* motion. A lengthy discussion between the parties and the trial court ensued (covering 20 pages in the reporter's transcript).

To establish a prima facie case of discrimination, defense counsel pointed out that Juror No. 10 was the only African-American person on the panel of 50 potential jurors. Taylor's counsel referenced a prior off-the-record, in-chambers discussion between the parties and the trial court, and represented that the prosecutor commented "that she felt that the prospective juror [Juror No. 10] would be more likely to support these two gentlemen [defendants] because they were Black, and she did not want this prospective juror to be the mouthpiece for these two Black gentlemen because she's Black and they are Black." Taylor's counsel also argued that the prosecutor "picked on" Juror No. 10, asking questions about "circumstantial evidence versus direct evidence" that were "not clear," confused "a lot of the jurors," and to which there were "no right answer[s]."

The trial court commented that it recalled the off-the-record discussion, during which the prosecutor requested the court question the potential jurors about race and "allude[d]" to Juror No. 10, specifically. The court had "no recollection of [the prosecutor] saying that she believed that juror number 10 was going to be the mouthpiece." The court asked Dean's counsel for her recollection, and she stated she did not "recall that exact statement," but did recall the prosecutor "being concerned about

race and that particular juror [Juror No. 10] in terms of her favoring the defendants."

Taylor's counsel reminded the trial court that, in response to the prosecutor's alleged comment about Juror No. 10 advocating for defendants, she had explained to the prosecutor: "It can cut both ways. I said, being the lone Black juror on the jury she might feel pressure in not letting them go. She did not want [*sic*] other jurors to feel she's giving them an unfair advantage." The court acknowledged hearing Taylor's counsel make these comments during the off-the-record discussion, but reiterated it did not hear the prosecutor make a comment about Juror No. 10 advocating for defendants.

The trial court asked the prosecutor for her recollection of the discussion. She responded: "My recollection is the court asked us to come to chambers to see if there were any questions that you would like for us to have the court address. I asked the court to inquire about race in general initially. I said I would like the court to inquire if anyone on the panel has either been the victim of a crime where the defendants were African American, and on the same token to inquire of juror number 10 regarding her views regarding the defendants because they are Black and she's Black. Okay? I didn't make any comments about being -- feeling that she was a mouthpiece for the defendants. But I did ask the court to -- I wanted the court to flush out the notion of race. I said it was the elephant in the room; that we have two African American men committing a crime. It's an issue that can

be addressed."[4] Later in the hearing, the prosecutor added: "I remember asking the judge to inquire of her [Juror No. 10] regarding whether or not she would feel in any way like she would not be able to convict based on race."

The trial court indicated it believed defendants made a prima facie case of discrimination, and asked the prosecutor to respond. The prosecutor stated she removed Juror No. 10 for the following reasons: "I did not like the response to the hypothetical. She did clearly say that she wants more evidence. She wouldn't have convicted or found guilty based on circumstantial evidence. She along with other jurors that I intend to kick made the same comment. I have a circumstantial case here. I really have no I.D. witnesses to the fact that these defendants went into the home. There's circumstantial evidence that they were in the home and took things from inside. So I don't want to risk any juror that has an issue with circumstantial evidence. Also, I do not like jurors who have no children and are not married and do not have life experience. She's young. I tend to kick jurors who are young with no life experience. That's another reason I did not choose to keep her there. Also, I did not like the way she was dressed and presented herself. I'm sorry. To me that -- to me that's a sign of lack of maturity. Low cut clothing with sandals.[5] So for those reasons, Your Honor, I chose to exercise a peremptory challenge."

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[4] The trial court declined to question the potential jurors about race, but did not preclude the prosecutor from making the inquiry. The prosecutor chose not to do so.

[5] The trial court noted it recalled the prosecutor mentioning Juror No. 10's clothing during the off-the-record discussion about

After further discussion between the trial court and the parties, the court denied defendants' *Batson*/*Wheeler* motion, finding the prosecutor "was not acting based on improper motive."

**Analysis**

The prosecutor presented the following reasons for removing Juror No. 10: her hesitation to convict based on circumstantial evidence, her lack of life experience, and clothing indicating a lack of maturity. It is evident from the transcript of the hearing that the trial court made "'a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered.'" (*People v. Lenix*, *supra*, 44 Cal.4th at p. 614.) The court found that the prosecutor offered race neutral reasons for removing Juror No. 10 and that those reasons were credible. The court's "'conclusions are entitled to deference on appeal.'" (*Ibid.*) That we might have reached a different conclusion if we were in the trial court's position is irrelevant. It is not our task to evaluate credibility. Our task begins and ends with deciding whether there is substantial evidence supporting the trial court's conclusions. There is. Juror No. 10 expressed a reluctance to convict based on circumstantial evidence. That is a race neutral reason for her removal.[6]

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race. The court commented: "And that took me back a little bit. I didn't know what that [her clothing] had to do with race. It is something that factors into her [the prosecutor's] analysis."

[6] Defendants ask this court to conduct a comparative juror analysis between Juror No. 10 and jurors the prosecutor did not remove. Such an analysis is not helpful to defendants' cause because no seated juror appears to share all of the characteristics the prosecutor articulated as reasons for removing Juror No. 10.

**Gang Enhancements**

Defendants contend there was insufficient evidence supporting the jury's true findings on the gang enhancement allegations.

"In reviewing a challenge to the sufficiency of evidence, 'the reviewing court must consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt.' [Citation.] We consider whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citations.] To prove a gang allegation, an expert witness may testify about criminal street gangs." (*People v. Romero* (2006) 140 Cal.App.4th 15, 18.)

"The gang enhancement applies to one who commits a felony 'for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.' (Pen. Code, § 186.22, subd. (b)(1).) 'In addition, the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or

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Even Juror No. 11, who was single, had no children and no prior jury experience, is not an apt comparison because Juror No. 11 ultimately agreed that circumstantial evidence could support a guilty verdict, while Juror No. 10 continued to hold out for direct evidence. We note the prosecutor removed Juror No. 8 who, like Juror No. 10, continued to express concern about finding the dog guilty based on the circumstantial evidence in the prosecutor's hypothetical, as set forth above.

symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a "pattern of criminal gang activity" by committing, attempting to commit, or soliciting two or more of the enumerated offenses (the so-called "predicate offenses") during the statutorily defined period.'" (*People v. Sanchez* (2016) 63 Cal.4th 665, 698.)[7]

Between them, defendants challenge the sufficiency of the evidence establishing (1) a criminal street gang, (2) the requisite number of predicate offenses to demonstrate a pattern of criminal gang activity, (3) the primary activities of the gang, and (4) that defendants committed the charged offenses for the benefit of, at the direction of, or in association with any criminal street gang, within the meaning of section 186.22, subdivision (b)(1).

**Criminal street gang/predicate offenses**

The prosecution presented expert testimony from Joshua White, a Los Angeles Police Department officer in the 77th Street Division Gang Enforcement Detail, whose assignment was to monitor the Brims gang. He knew Dean as an active Six Deuce Brims gang member, known by the moniker "Deuce Capone." He knew Taylor as an active Van Ness Gangster (VNG) Brims gang member, known by the moniker "Snatch 'Em Up."

Defendants argue there was insufficient evidence of a "criminal street gang" within the meaning of the gang enhancement under section 186.22, subdivision (b)(1)(B), because

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[7] The prosecution may use the residential burglary charged in this case as one of the two predicate offenses. (*People v. Loeun* (1997) 17 Cal.4th 1, 10.)

the prosecution did not establish Dean, a Six Deuce Brims gang member, and Taylor, a VNG Brims gang member, were members of the same gang, the Brims gang. In a related argument, Taylor argues that predicate offenses committed by Six Deuce Brims gang members do not establish a pattern of gang activity supporting a gang enhancement as to him because he is a VNG Brims gang member. For the reasons set forth below, we reject these arguments and find substantial evidence supports the criminal street gang and pattern of gang activity elements of the gang enhancements found against both Dean and Taylor.

According to Officer White, the Brims gang was originally called "the L.A. Brims." As the gang expanded, its members began to identify themselves by geographic area, or subsets of the larger Brims gang. White used a photograph of gang graffiti to illustrate that the various sets of Brims are part of one larger gang. In the photograph, the letters "FHN" represented three sets of Brims—the Fruit Town Brims, the Six Deuce Harvard Park Brims and the VNG Brims—all falling under the Brims "umbrella." White explained that it was common for a Brims gang member from one set (e.g., Six Deuce Brims) to display the particular gang sign of another Brims set (e.g., VNG Brims) because the various sets were united as one Brims gang. For example, White referred to a photograph of defendant Dean, a Six Deuce Brims gang member, displaying the VNG hand sign while at a park in VNG territory. White identified a particular man as the leader of the larger Brims gang. The prosecution presented substantial evidence showing that Six Deuce Brims and VNG Brims (with about 200 members combined as of March 2014) associated daily as part of one larger Brims gang. Thus, predicate offenses committed by Six Deuce Brims gang members

support the pattern of gang activity element of the gang enhancement as to Taylor, a VNG Brims gangs member.

**Primary activities of the gang**

Dean contends the prosecution failed to present sufficient evidence supporting the primary activities element of the gang enhancements. We disagree.

Based on his experience as a gang officer assigned to monitor the Brims gang, Officer White testified that the primary activities of the Brims gang are "robberies, residential burglaries, home invasion robberies, assault with deadly weapons, attempted murder, all the way up to murder," crimes that satisfy the primary activities element of the gang enhancement. With respect to robberies, home invasion robberies and burglaries, White testified that Brims gang members engaged in these primary activities "repeatedly and consistently." Defendants did not object to this testimony at trial. White's testimony is sufficient to establish the primary activities element of the gang enhancements. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.)

Moreover, Dean and Taylor, Brims gang members, committed a residential burglary in this case. The prosecution presented evidence of a gang-related residential burglary committed by two Six Deuce Brims gang members, Demonte Sears and Deandre Johnson.[8]

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[8] The prosecution also presented evidence of a residential burglary committed by Matthew Demondre. White identified Demondre as a VNG Brims gang member, based on information he received from other officers. At trial, defendants objected to White's identification of Demondre as a VNG Brims gang member on hearsay grounds. On appeal, they challenge this

Officer White testified that some Brims gang members wore Hollister brand clothing, which had a logo depicting a small bird. He explained: "It's known as flocking. They're getting the tattoos and wearing the clothing of the bird and letting other members know in the gang that they're going out and doing residential burglaries and being part of a flocking crew, and it's common now to see that in the clothing."

Substantial evidence supports the primary activities element of the gang enhancements.

**Evidence defendants committed the crimes for the benefit of, at the direction of, or in association with a criminal street gang**

Defendants challenge the sufficiency of the evidence establishing they committed the offenses for the benefit of, at the direction of, or in association with a criminal street gang.

Detective King, the leader of a task force targeting gang-related robberies and burglaries, testified regarding the residential burglaries committed in the San Gabriel Valley by gang members. The residential burglary committed by Dean and Taylor, two Brims gang members, fits the pattern described by King—gang members from South Los Angeles, traveling to the San Gabriel Valley in a high-end vehicle with tinted windows registered to another person at an address outside the area (in this case, Hawthorne), searching for jewelry and cash.

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testimony as a violation of their rights to confrontation. We need not address the merits of this contention because any error would be harmless beyond a reasonable doubt. The prosecution satisfied the predicate acts and primary activities elements of the gang enhancements without Demondre's offense.

Based on a hypothetical predicated on the facts of this case, Officer White opined that the hypothetical burglary was committed for the benefit of the gang because, in his experience as a gang officer, gang members who commit these types of residential burglaries together typically do so to raise money to benefit the gang.

To prove the gang enhancement allegations, the prosecution was not required to establish Dean and Taylor committed the crimes *for the benefit* of the Brims gang. The prosecution could satisfy this element by establishing Dean and Taylor committed the offenses *in association* with the Brims gang. "A trier of fact can rationally infer a crime was committed 'in association' with a criminal street gang within the meaning of section 186.22, subdivision (b) if the defendant committed the offense in concert with gang members." (*People v. Leon* (2016) 243 Cal.App.4th 1003, 1021.) It "is conceivable that several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang." (*People v. Morales* (112 Cal.App.4th 1176, 1198; *People v. Weddington* (2016) 246 Cal.App.4th 468, 484 ["the first prong—that the underlying offense was 'gang-related'"— "may be established with substantial evidence that two or more gang members committed the crime together, unless there is evidence that they were 'on a frolic and detour unrelated to the gang'"].) Here, however, there was no evidence of such a frolic and detour unrelated to the Brims gang. Moreover, "if substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist

criminal conduct by those gang members." (*People v. Albillar* (2010) 51 Cal.4th 47, 68.)

Substantial evidence demonstrates defendants, two Brims gang members, assisted each other in committing a residential burglary, which bore the hallmarks of other gang-related residential burglaries committed in the San Gabriel Valley (as described by Detective King and summarized at the beginning of this section). Dean committed the evading offense so that he and Taylor could continue their criminal conduct (taking away the loot). The prosecution presented sufficient evidence showing Dean and Taylor committed the charged offenses in association with a criminal street gang with the specific intent to promote, further, or assist in any criminal conduct by gang members.

**Sentencing Errors**

Defendants contend, and the Attorney General concedes, the trial court erred in imposing a concurrent term for the petty theft in count 4. We agree. The court should have imposed and stayed the sentence for petty theft under section 654, which "has been held to preclude punishment for both burglary and theft where, as in this case, the burglary is based on an entry with intent to commit that theft." (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1468.) We will direct the trial court to stay defendants' sentences for petty theft.

Dean contends, the Attorney General concedes, and we agree, the trial court erred in imposing a five-year term for the gang enhancement on count 2 because the offense charged in count 2 (evading a police officer in willful disregard for safety) is not a serious felony as required for imposition of the five-year term under section 186.22, subdivision (b)(1)(B). Dean and the Attorney General agree the appropriate remedy is remand for

resentencing under section 186.22, subdivision (b)(1)(A), which provides a two, three or four-year term for a gang enhancement on a count that is not a serious or violent felony. We also agree, and will remand the matter for resentencing as to Dean.

Taylor contends, and the Attorney General agrees, that the judgment against Taylor must be corrected to reflect the trial court's imposition of a five-year enhancement term on count 1 (burglary) under section 186.22, subdivision (b)(1)(B), not section 12022.1, as the judgment erroneously indicates. We also agree. At the sentencing hearing, the trial court imposed a five-year consecutive term on count 1 for the gang enhancement under section 186.22, subdivision (b)(1)(B). The court dismissed the bail enhancement allegation under section 12022.1, because the district attorney did not present evidence supporting the allegation. We will direct the trial court to correct the judgment against Taylor to reflect the imposition of the five-year enhancement under section 186.22, subdivision (b)(1)(B).

The Attorney General argues, and Dean does not dispute, that the trial court awarded Dean four days of actual presentence custody credit to which he was not entitled. The Attorney General is correct. Dean was arrested on March 12, 2014, and sentenced 177 days later, on September 4, 2014. The trial court, however, awarded Dean 181 days of actual presentence custody credit and 180 days of local conduct credit. We will direct the trial court to correct the judgment to reflect that Dean is awarded 177 days of actual presentence custody credit, and 176 days of local conduct credit, for a total of 353 days of presentence credit (the same amount the trial court awarded Taylor, who was arrested and sentenced on the same dates as Dean).

The Attorney General also argues, and Dean does not dispute, that the trial court erred in imposing and staying the two one-year prior prison term enhancements. The Attorney General is correct. With respect to the prior prison term enhancement arising out of case number TA115034, the court should have struck the enhancement because the court already used the conviction in case number TA115034 to impose the five-year prior serious felony enhancement under section 667, subdivision (a)(1). (*People v. Jones* (1993) 5 Cal.4th 1142, 1144-1145 [a prison sentence may not "be enhanced both for a prior conviction and for a prison term imposed for that conviction"].) With respect to the prior prison term enhancement arising out of case number BA368316, the court was required to impose the enhancement or dismiss it with a statement of reasons under section 1385. (*People v. Langston* (2004) 33 Cal.4th 1237, 1241 ["Once the prior prison term is found true within the meaning of section 667.5(b), the trial court may not stay the one-year enhancement, which is mandatory unless stricken"].) We will remand the matter for the trial court to strike or impose the one-year prior prison term enhancement arising out of case number BA368316.

**Independent Review of Trial Court's In Camera Hearing**

The parties have asked this court to independently review the sealed transcript from the July 15, 2014 in camera hearing on the district attorney's ex parte application under Evidence Code section 1040 to protect certain information from disclosure. We have independently reviewed the matter and conclude the trial court properly exercised its discretion in ruling on the motion. (*People v. Haider* (1995) 34 Cal.App.4th 661,664-665, 669 [we

review trial court's ruling on motion to protect privilege under Evidence Code section 1040 for abuse of discretion].)

## DISPOSITION

As to Dean, the matter is remanded for the trial court (1) to strike the gang enhancement under section 186.22, subdivision (b)(1)(B), on count 2 for evading a police officer with willful disregard for safety; (2) to impose the gang enhancement under section 186.22, subdivision (b)(1)(A), on count 2 for evading a police officer with willful disregard for safety and to sentence Dean for that enhancement, (3) to impose or strike the one-year prior prison term (§ 667.5, subd. (b)) for case number BA368316, (4) to stay the sentence imposed on count 4 for petty theft, and (5) to correct his presentence custody credits to reflect 177 days of actual presentence custody credit, and 176 days of local conduct credit, for a total of 353 days of presentence credit.

As to Taylor, the trial court is ordered to correct the judgment to reflect that the sentence imposed on count 4 for petty theft is stayed and that the five-year enhancement term on count 1 for residential burglary was imposed under section 186.22, subdivision (b)(1)(B), not section 12022.1. The clerk of the superior court is directed to prepare an amended abstract of judgment as to Taylor and to forward it to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

LUI, J.